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No. 5282

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. DEAN, as Trustee in Bankruptcy of the Estate of Robert E. Shephard (a Bankrupt),

Appellant,

vs.

ROBERT E. SHEPHARD (a Bankrupt),

Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF FACTS.

I.

Appellant's statement of facts is quite incomplete and by way of supplementing same we therefore quote as follows from the agreed statement of facts (Tr. pages 8 to 11), to wit:

> "That the bankrupt was and is an auto-body mechanic and had followed that trade exclusively and continuously for more than fifteen years last past and up to the present time; that at the time of filing his petition—and for some four months previously he was carrying on his trade by himself alone and had no other mechanics or men working for him;
>
> That at the time of filing his petition in bankruptcy the bankrupt was using in his said trade

and claimed as exempt the following tools and implements, to wit:

1 12″ joiner with 2 HP. direct drive motor attached.

1 36″ band saw connected up with ½″ post drill and an emery wheel and driven by a 5 HP. motor.

and the following transmission equipment:

1 countershaft with 4 pulleys and 2 hangers, 1 3½″ belt, ¼″ belt, 1-2″ belt, 2 Wells-Norris motor starting switches.

That the bankrupt could not carry on his trade as an auto-body mechanic under present day conditions without the use of said implements driven by electric motors—that such (implements) bandsaw, joiner, drill and emery wheel with said motors to drive are part of the ordinary equipment of an auto-body mechanic who carries on his trade as such and is the *minimum* equipment with which an auto-body mechanic can successfully carry on his trade; that without said equipment an auto-body mechanic cannot carry on said trade for himself.

That the bankrupt—at no time has been a manufacturer of auto-bodies but that his work as auto-body mechanic has been confined to the rebuilding and repairing of auto and commercial bodies and the occasional making of commercial bodies—on special orders—as a jobbing shop.''

By a clever play and repetition of the words ''power machinery'' and ''power driven'' appellant has studiously sought to convey the impression that the implements involved here were complicated and heavy machinery and required expensive motors of larger power to operate the same. I believe the expression ''power machinery'' and ''power driven'' occurs some 40 times in the course of appellant's short brief. This

argument is ridiculous considered in the light of the facts that this so-called "power machinery" consisted solely of one 2 HP. and one 5 HP. electric motor. I presume appellant would designate the ordinary household electric washing machine or vacuum sweeper as "power machinery". Under the agreed statement of facts the testimony is positive and unequivocal that the tools and implements claimed as exempt are *"the minimum equipment with which an auto-body mechanic can successfully carry on his trade; that without said equipment an auto-body mechanic cannot carry on that trade for himself"* which facts bring the case clearly within the provisions of Sub. 4, Sec. 690 C. C. P. which exempts "the tools or implements of a mechanic or artisan necessary to carry on his trade".

II.

The argument of appellant seems to be first, that inasmuch as electric motors for commercial use had not been invented at the time of the adoption of Sec. 690 C. C. P., therefore electrically driven implements are in no case exempt, no matter how necessary they might be as implements of a mechanic. And second, that the items referred to cannot be considered as implements of trade.

1st. As far as the first point is concerned, the argument is entirely fallacious. If that point were true, then in no case could any tools of any auto-mechanic be exempt because automobiles and auto-mechanics did not exist when Sec. 690 was enacted. It is true that in *Conlin v. Traeger,* 53 C. A. D. 1206 the Court

refused to sustain the exemption claimed by a physician of his automobile but this ruling was under the peculiar phraseology of Sec. 690 C. C. P. 6, which exempts "one horse with vehicle and harness or other equipment used by a physician in the legitimate practice of his profession". Manifestly an automobile could not by any stretch of imagination be classified as "one horse with vehicle".

2nd. It remains only to consider whether the bandsaw and planer, etc., with the motors to run them are "necessary" and whether they are "implements" within the meaning of Sec. 690, Sub. 4.

See *In re Millington,* 63 Cal. App. 498,

Where the Court in speaking of "Necessary wearing apparel" as that term is used in our exemption law says:

> "Of course, the word 'Necessary' does not limit wearing apparel to that which is *indispensable,* but it is sufficiently flexible to include things which are usual appropriate for the reasonable comfort and convenience of a debtor, although they may not be absolutely necessary for mere subsistence. (Freeman on Executions, 3d ed., sec. 232; Leavitt v. Metcalf, 2 Vt. 342 (19 Am. Dec. 718); Sellers v. Bell, 94 Fed. 801 (36 C. C. A. 502).)"

The testimony in the case at bar shows that the tools and implements referred to were not merely "usual and appropriate" for the debtor's use in carrying on his trade but that they were really indispensably necessary.

We would infer that appellant contends that inasmuch as a journeyman auto-mechanic is not required to supply the tools he works with, therefore they are

in no case exempt. But the contrary has always been held in this state.

13 *Cal. Jur.* "Exemption", Sec. 3, p. 334.

> "The law does not require that a mechanic shall be employed as a journeyman in order to be entitled to the exemption. He is as clearly a mechanic who owns a tool, and uses it himself in the manufacture of articles, as is a journeyman who works in an establishment and has such tools supplied by the manufacturer. And a tool or implement will not be held to be unnecessary merely because some journeyman machinist can get employment with a manufacturer who will supply the implement".

s. c. *In re Robb,* 99 Cal. 202.

Where the question was involved whether a lathe and certain appliances used by a machinist in running it were exempt, and the Court held it was exempt, stating:

> "It is contended that a lathe is not a tool or implement required by a mechanic, and evidence was given to the effect *that a journeyman machinist when working for others is not usually required to provide an implement of that character.* This evidence tended simply to show that such a tool or implement is not necessary for a mechanic who is a machinist while employed as a journeyman, but the law does not require that a mechanic shall be employed as a journeyman in order to be entitled to the exemption. Nor is the phrase 'necessary to carry on his trade' used in such strict sense that because some journeyman machinist *can* get employment with a manufacturer who will supply the implement, therefore it is not necessary to the trade within the meaning of the statute.
>
> The implement in question, according to the testimony of the claimant, was necessary to carry

> on his business as a mechanic and machinist, and is a tool used for shaping wood or metal, cost about two hundred and fifty dollars, was run by manpower, one man easily turning it, and was a tool ordinarily and necessarily used by mechanics and machinists in their trade."

s. c. *In re Petersen,* 95 Federal 417,

Decided by the late Judge DeHaven where it was held that the miscellaneous equipment of a baker consisting of pans, peals, molds, bread boxes, benches, dough mixers, knives, sieve, ornamenting tools, bread scales, and scrapers used and to be used by the bankrupt and his employees were exempt, the Court quoted with approval from *In re Robb,* infra and held

> "So, also, under the statute of this state (California), the tools and implements which may be properly claimed by an artisan as necessary in carrying on his trade, are not in all cases limited to such only as he *personally* uses while so engaged, but may include tools and implements *used by others* whom it is reasonably necessary for him to employ to assist him in his work, in order that the same may be prosecuted conveniently, and in the usual or ordinary way in which the business of such trade is conducted."

It is not the law that the exemption is limited to hand tools and implements.

See *Reeves v. Basque,* 76 Kan. 333, 123 Am. St. Rep. 137, 91 Pac. 77, where

It was held, under a statute exempting "tools, implements—of any mechanic—used and kept for the purpose of carrying on his trade and business" (which is substantially like the California statute) that a traction engine and saw mill were exempt, and similarly in

Woods v. Bresnahan, 63 Mich. 614, 30 N. W. 206,

A shingle machine, steam engine and flywheel and a saw gummer were exempt under a similar statute.

The word "implements" used in our statute is not synonymous with the word "tools", but has a wider meaning.

See 12 *Cal. Jur.* "Exemptions", page 334, where it is stated

> "The statute exempts from execution or attachment, 'the tools or implements of a mechanic or artisan, necessary to carry on his trade'. The words 'tools' and 'implements' herein used are not synonymous, the latter being the broader term. It is difficult to define accurately the word 'implements' and the courts seem never to have attempted it. It has been held, however, that the word is broad enough to 'include a jeweler's safe owned and used in the business of a jeweler and watch repairer.' citing
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> *In re McManus,* 87 Cal. 292.

The word "implements" also occurs in the exemption of the farmers (though the word "necessary" is not there found and the value is limited to $1000.00), and under that statute it was held in

Estate of Klemp, 119 Cal. 41, that a

Combined harvester used by the debtor on his own farm and occasionally for outside work was an *implement* of husbandry, the Court stating:

> "Horse rakes, gang plows, headers, threshing machines, and combined harvesters are as clearly implements of husbandry as are hand rake, single plows, sickles, cradles, flails, or an old-fashioned machine for winnowing. There is no ground for excluding an implement from the operation of the statute because it is an improvement, and supplants a former implement used

with less effectiveness for the same purpose. *Present methods of farming, as well as conducting other kinds of business, require the use of improved machinery.*''

s. c. *Spence v. Smith,* 121 Cal. 536,

When a threshing outfit worth $460.00 was held exempt even though the debtor usually used it for hire to thresh the crops of others after doing his own work.

It is doubtless true that in some jurisdictions the words ''tools and implements'' are given a restricted meaning and are limited to hand-tools and hand-or-foot-operated machinery and appellant quotes from *Freeman on Executions,* p. 1212 to that effect. But that same author says on page 1218

> ''So far as we are aware, none of the Courts have undertaken to define the word 'implements' as used in these statutes. The lexicographers define it as 'whatever may supply a want; especially an instrument or utensil as supplying a requisite to an end; as the implements of trade, of husbandry, or of war'; and a utensil they declare to be 'that which is used; an instrument, an implement; especially an instrument or vessel used in a kitchen, or in domestic and farming business'. By the Courts, these words are accorded a broad signification, and exempt many things which are not tools. Thus, statutes exempting implements or utensils have been adjudged to exempt a printing press, type, and other articles, used in publishing a newspaper.''

and again on page 1220 says:

> ''In fact, there seems to be no limitation of the things which may be held exempt as implements, save that of necessity. If they are necessary in the debtor's trade or calling, they are exempt, though they are not mere tools, but are complicated and expensive machinery.''

California has clearly placed herself in line with the more liberal and humane rule set forth in

25 *C. J.* "Exemptions", p. 50, as follows:

> "In other jurisdictions the terms 'apparatus', and even 'implements', have been construed more broadly to exempt machines driven by electricity, steam, or water, where it is shown that they are necessary to the debtor in conducting his business. In these jurisdictions exemptions are extended to an electric motor and lathe, and in several of the western states to portable steam engines and machinery for sawing logs and making lumber, the courts basing their decision in the latter group of cases on the fact that the lumberman debtor and owner uses the machinery in person and performs a considerable portion of the work himself, and that without such machinery the business of a lumberman cannot be carried on."

It is therefore respectfully submitted that the exemption claimed should be allowed, and the order made by the District Court affirmed.

Dated, Oakland,
March 19, 1928.

W. E. Rode,
Attorney for Appellee.